83-2050

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ALEXANDER L. STEVAS

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC POWER & LIGHT COMPANY,
PETITIONER,

V.

PUBLIC SERVICE COMMISSION OF WYOMING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE WYOMING
SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state constitutionally deny any and all compensation for investments prudently made by a regulated public utility to meet its statutory duty to provide adequate electric service?

2. Is a procedural prerequisite to compensation for such investments, created by a state court ten years after the fact, which is applied to preclude a decision on the merits (a) consonant with procedural due process requirements or (b) a state ground sufficiently independent and adequate to prevent review of Petitioner's constitutional claims?

PARTIES

Petitioner Pacific Power & Light Company[1] provides electric service as a

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[1] Petitioner Pacific Power & Light Company is a Maine corporation and owns portions of the following subsidiaries and affiliates: Northwest Energy
(Footnote continued)

regulated public utility in Wyoming. Respondent Public Service Commission of Wyoming is the state agency in

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(Footnote 1 continued from previous page) Services Co., NORNEV Demonstration Geothermal Co. and Pacific Northwest Power Co.

In addition, Petitoner has two wholly owned subsidiaries, Pacific Telecom, Inc. and NERCO, Inc., which in turn own portions of the following subsidiaries and affiliates: Associated P&C Engineers, Inc.; AT&E Corp.; Cid Communications, Limitada; Comdial Corp.; Evotek; Eyedentify; Flight Dynamics, Inc.; Interion Telephone Co.; Multivisions, Inc.; Multivisions, Ltd.; STU Partnership; TelCom Construction Co.; AKRG Joint Venture; Alligator Ridge Joint Venture; Bonnifield/Dry Creek Project; Bridger Coal Co.; Candelaria Partners; Clements Energy Associates; Clements Energy 1979-I; Clements Energy 1979-II; Clements Energy 1980; Clements Energy 1981; Clements Energy 1982-I; Clements Energy 1982-II; Decker Coal Co.; Ketchum Creek Joint Venture; Montana Royalty Company, Ltd.; Prince of Wales Project; Rampart Joint Venture; Ruby Joint Venture; Teton Nuclear Exploration; Texas Eastern-Lo Project and Unga Joint Venture.

Wyoming with the duty to regulate public utilities.[2]

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[2] The decision of the Wyoming Supreme Court consolidated four separate appeals from three different dockets originally before the Respondent, Public Service Commission of Wyoming. Hearings were consolidated at both the commission and appellate levels. However, the other three appeals were decided by the Wyoming Supreme Court on different grounds and, therefore, the remaining appellants before that court were not included as parties in this petition.

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REPORTS OF OPINIONS AT ISSUE

The decision of the Wyoming Supreme Court is reported at 677 P2d 799 (Wyo 1983). It is reprinted in the Appendix at 1, followed by the court's Order Denying Rehearing at 73. The underlying Memorandum Opinion and Final Order of the Public Service Commission of Wyoming in Docket No. 9454 Sub 17 (Dec. 2, 1982) is reprinted in the Appendix at 75.[3]

GROUNDS FOR JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 USC § 1257(3) to review the decision of the Wyoming Supreme Court issued February 7, 1984, which became

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[3] The District Court of the First Judicial District of Laramie County affirmed Respondent's order without independent review. Order Denying Motions for Briefing and Affirming the Order of the Public Service Commission of Wyoming, Docket No. 100-92 (Wyo Dist Ct Mar. 2, 1983).

final upon entry March 8, 1984 of the Order Denying Rehearing by the Wyoming Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution states, in pertinent part, as follows:

> No person shall be *** deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

3. Wyoming Statutes § 37-3-112 provides as follows:

> The service and facilities of every public utility shall be adequate and safe and every service regulation shall be just and reasonable.

STATEMENT OF THE CASE

A. Statement Including Material Facts

Most, if not all, states have statutes requiring public utilities to provide safe and adequate service to meet the present and future needs of their customers. Wyoming is no exception. Wyo Stat § 37-3-112, supra. As the Wyoming Supreme Court acknowledged in this case: "It should also be noted that utilities are under a statutory duty to provide service that is adequate and safe. Section 37-3-112, W.S. 1977. This may carry with it the obligation to take some action to ensure future supplies." App. at 32.[1]

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[1] References to the separately bound appendix to this petition will (Footnote continued)

In order to fulfill their duty to serve, electric utilities prepare forecasts of growth in public demand for electricity over the period necessary to design and construct any new facilities that may be required. During the ten years or so needed to design, site, license and construct a major generating facility, such as a nuclear power plant, conditions materially different from those predicted may develop and dictate that a particular construction project be abandoned. This is the situation Petitioner faced with respect to the two nuclear projects involved in this case.

By the late 1960s, it was acknowledged that Petitioner and the Pacific Northwest region generally faced a

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(Footnote 4 continued from previous page) appear as "App. at" followed by appropriate page citations.

serious projected energy shortage (Tr. 461-62). As a result, Petitioner and other Northwest utilities developed a construction and acquisition program to meet their projected needs for generating capacity. Both the Pebble Springs Project and the Washington Public Power Supply System Project No. 5 ("WNP-5"), the two nuclear plants at issue here, were a part of this program.

Petitioner became a minority owner in Pebble Springs by accepting participation in October 1974 and signing an owner's agreement in January 1976 (Tr. 668-69). Petitioner began booking its costs for this project in May 1975 (Ex.7, Table 7-3). Similarly, Petitioner became a 10% owner of WNP-5 by accepting participation in March 1975 and signing an owner's agreement in July 1976 (Tr. 678). Petitioner began booking costs on WNP-5 in May 1976 (Ex. 7, Table 7-4).

Because of changed conditions beyond Petitioner's control, both Pebble Springs and WNP-5 were canceled by their sponsors (Tr. 474-79). Petitioner's direct investment in the two projects as of December 1981 was $182 million, of which $31.9 million is allocated to Petitioner's Wyoming operations. (Ex. 7, Tables 7-1, 7-2; Ex. 12, Tables 12-3, 12-5). Petitioner's combined after-tax investment was estimated at $129 million, of which $20.5 million is allocated to Petitioner's Wyoming operations (Tr. 543; Ex. 12, Tables 12-3, 12-5).

Respondent denied Petitioner recovery of any portion of its investments without regard to whether they were prudent. That action was affirmed by the Wyoming Supreme Court on a novel ground not advanced by Respondent or any other party. Thus, the first question presented by this petition is whether a

state can constitutionally deny a regulated electric utility all compensation for funds invested prudently, in the ordinary course of its business and in fulfillment of its statutory duty to serve, in a generating project later abandoned due to unforeseen circumstances.

The Fifth Amendment of the United States Constitution prohibits the taking of private property without just compensation. This prohibition is applied to the states through the Fourteenth Amendment. This Court has applied this concept many times to the regulation of public utilities and made clear that unreasonable regulation by state utility commissions can result in the taking of utility property without just compensation. See, e.g., Los Angeles Gas & Elec. Corp. v. R.R. Comm'n, 289 US 287, 53 S Ct 637, 77 L Ed 1180 (1933); McCardle v.

Indianapolis Water Co., 272 US 400, 47 S Ct 144, 71 L Ed 316 (1926); Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n, 262 US 679, 43 S Ct 675, 67 L Ed 1176 (1923).

In Fed. Power Comm'n v. Hope Natural Gas Co., 320 US 591, 64 S Ct 281, 88 L Ed 333 (1944), the Court interpreted the requirement of "just and reasonable" rates in the Natural Gas Act to require a balancing of consumers' and investors' interests:

> The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and consumer interests. *** From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. 320 US at 603, 64 S Ct at 288, 88 L Ed at 345. (Citations omitted and emphasis added.)

In Permian Basin Area Rate Cases, 390 US 747, 88 S Ct 1344, 20 L Ed 2d 312

(1968), this Court clarified its position in Hope and found that "the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards." 390 US at 770, 88 S Ct at 1361, 20 L Ed 2d at 338.

As a general rule, just and reasonable rates allow recovery by the utility of prudent expenditures. Justice Cardozo observed for the Court in West Ohio Gas Co. v. Pub. Util. Comm'n, 294 US 63, 55 S Ct 316, 79 L Ed 761 (1935), that:

> A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial. 294 US at 68, 55 S Ct at 319, 79 L Ed at 767. (Emphasis added.)

Because of the approach taken by Respondent and by the Wyoming Supreme

Court, Petitioner has received no compensation, let alone just compensation, for its investment in the two projects.

The second question presented by the petition is whether a constitutional right to just compensation can be thwarted by a procedural prerequisite articulated by a state court for the first time ten years after the time for satisfying that step had expired. In its order in this case, the Wyoming Supreme Court held that under state law expenditures of this type could properly be recoverable through rates, but went on to create a procedural hurdle to bar recovery in this instance. Thus, the court stated a new rule: "if the utility wishes to involve the consumer in a loss or cost resulting from failure of the project, i.e., if it wishes to have such cost or loss considered in subsequent rates, [the commission's] prior approval

is necessary." App. at 42-43. The court went on to define "prior approval" as "if the consideration, and only if the consideration is given before the investment is made or agreed to be made." App. at 44. In the case of both Pebble Springs and WNP-5, the investment was made or agreed to be made in the mid-1970s.

A fundamental requisite of due process is the opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950). Further, the hearing must be meaningful. Bell v. Burson, 402 US 535, 91 S Ct 1586, 29 L Ed 2d 90. Neither the Respondent nor the Wyoming Supreme Court addressed Petitioner's prudence, which was fully developed on the record, or at any stage attempted to balance the interests of Petitioner's consumers and investors. Petitioner here has been denied due process from the absence of a

decision based on the record. As stated by the Court:

> It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision does not meet this standard. Bell v. Burson, 402 US at 542, 91 S Ct at 1591.

This Court has consistently held that state court judgments will not be reviewed if they are based on adequate and independent state grounds. That principle, however, does not permit state courts to insulate their decisions from federal constitutional review on the basis of insubstantial state grounds. Demorest v. City Bank Farmers Trust Co., 321 US 236, 64 S Ct 384, 88 L Ed 526 (1944). Thus, this Court has said:

> It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support. Of couse, if nonfederal

> grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. **** But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof. Ward v. Bd. of Comm'rs, 253 US 17, 22-23, 40 S Ct 419, 421 (1920). (Citations omitted).

NAACP v. Alabama, 357 US 449, 78 S Ct 1163, 2 L Ed 2d 1488 (1958); Household Telegraph Cable Co. v. Newport, 247 US 464, 38 S Ct 566, 62 L Ed 1215 (1918); Rogers v. Alabama, 192 US 226, 24 S Ct 257, 48 L Ed 417 (1904).

The Wyoming Supreme Court rule in this case is neither adequate nor independent:

(1) The Wyoming Supreme Court admitted that "the foregoing statutes and rule do not require [commission] approval for PP&L's part ownership of the terminated projects" and "The utility need not

consult [the commission] before embanking (sic) on the project." App. at 40, 42. Further, the court cited no statute that empowers the Respondent to grant the suggested approval. Justice Rose, in his concurrence, stated that even if Petitioner had asked for approval in 1975, the Respondent would have been without power to grant such approval. App. at 56-57.

(2) That the new rule is a creation of the court is also apparent from the detailed approval now required by the court with a complete absence of statutory support. Thus, the court stated:

> [T]he risk attributable to the consumers can be evaluated and be either rejected or accepted--or, perhaps, the proportion of the risk to be borne by the consumers, if unsuccessful, can be set. The conversion computations to a used and useful property, if successful, and the period of amortization, if unsuccessful and such becomes necessary, can be

> predetermined. The percentage of the investment attributable to the Wyoming operation can be ascertained. All to be done before the fact of success or failure is known. App. at 44-45.

(3) In this and parallel circumstances, recovery has been allowed in Wyoming without requiring explicit commission approval prior to the request for rate recovery, let alone requiring the list of specific findings enumerated by the Wyoming Supreme Court in its order. Thus, the Respondent allowed recovery of Petitioner's costs related to the High Mountain Sheep Project. High Mountain Sheep was a proposed hydro project on the Snake River which was abandoned in 1975 and which never produced any electricity. However, Respondent allowed amortization of the associated costs over a five-year period (Tr. 862-63). Further, Respondent has allowed recovery of gas exploration,

drilling and development costs previously. Northern Gas Co., 25 PUR4th 317 (Wyo PSC 1978); Northern Utilities, Inc., 25 PUR4th 365 (Wyo PSC 1978).

In reference to these cases, the Wyoming Supreme Court stated that "Usually the activity which subsequently failed was approved as an activity prior to its inception." App. at 43. There is no indication in any prior case that prior approval existed or that such approval was material to the commission's decision. The rule announced by this Court in NAACP v. Alabama, supra, applies:

> [S]uch a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon

> prior decisions, seek vindication in state courts of their federal constitutional rights. 357 US at 457-58, 78 S Ct at 1169, 2 L Ed 2d at 1497.

(4) The sole rationale given by the Wyoming Supreme Court for its new rule of prior approval is meritless. The court stated that "The requirement for prior approval of the [commission] is necessary so that the risk attributable to the consumers can be evaluated and be either rejected or accepted." App. at 44-45. (Emphasis added.) Nowhere does the court explain why the interests of consumers and investors cannot be -balanced equally well, if not better, after the conclusion of a given project - either at operation or abandonment. In the four-day hearing before Respondent, Petitioner presented the testimony of nine witnesses. The staff of the Public Service Commission, which adopts an adversarial role at the hearing (Rules of the Public Service

Commission of Wyoming § 103c (1979)), presented two witnesses contesting various parts of Petitioner's case. Thus, Petitioner's reasons for commencing, continuing and abandoning both projects were fully developed. Had it been claimed that material information was unavailable or that an adequate review could not be performed, Respondent could simply have weighed the evidence and found the Petitioner had not sustained its burden of proof. Contrary to the Wyoming Supreme Court statement, there is no need for prior approval in order to evaluate the risk attributable to consumers.

(5) At no stage did any party argue or even suggest the existence of the procedural rule the court used to dispose of this case. This is additional evidence

that the rule was developed to deny Petitioner compensation, rather than to enforce pre-existing standards.

In conclusion, it is an unconstitutional taking of private property without just compensation for the state, on the one hand, to require an investment to be made to provide adequate electric utility service and, on the other, to deny all compensation without examining the prudence of the investment or weighing the interests of both consumers and investors. Further, the court's creation of a procedural prerequisite after the fact to bar all compensation cannot preclude Petitioner from its right to a determination on its constitutional claim.

B. Stage At Which Federal Question Was Raised

Petitioner raised its constitutional claims at every level of the proceedings in this case. During the evidentiary hearing before the Wyoming Public Service Commission, counsel for the staff of the commission moved to strike the testimony of two of Petitioner's witnesses (Tr. 859). Petitioner's counsel had argued in support of its constitutional claims that the testimony would establish confiscation if all recovery was denied (Tr. 856-57). The commission denied the motion to strike (Tr. 859).

Pages 49-53 of Petitioner's brief before the commission specifically cited both the Fifth and Fourteenth Amendments to the United States Constitution in arguing that a complete denial of compensation would result in a taking of private property without just

compensation. The commission's order made no mention of Petitioner's constitutional claims.

Petitioner reaffirmed its constitutional law claims in its Petition for Review in the District Court of the First Judicial District for Laramie County, Wyoming. The following appeared in that petition:

> 12. ***Further, by denying Pacific the right to recover such expenditures, the Commission has reduced Pacific's rate of return to a confiscatory level and has taken its property without due process of law in violation of *** the Fifth and Fourteenth Amendments to the United States Constitution *** .
>
> 13. The Order is unlawful and should be set aside because it is:
>
> * * * * *
>
> b. Contrary to Pacific's constitutional rights, as set forth above.

The District Court affirmed the commission's order without independent review.

Petitioner once again squarely presented the issue in its Docketing Statement before the Wyoming Supreme Court, both in its statement of the case and in the questions presented:

> Furthermore, if no compensation is allowed in this case, Pacific's right to due process under the Wyoming Constitution is denied and its property is taken without just compensation in violation of both the Wyoming and United States Constitutions. US Const Amend V, XIV (Docketing Statement pp. 3-4).
>
> 4. Does a denial of any recovery in this instance force an unconstitutional taking of Pacific's property without just compensation or due process? (Docketing Statement at 4.)

These issues were argued before the Wyoming Supreme Court in Petitioner's opening brief at pages 1, 10-11, 32-33 and in Petitioner's reply brief at pages 13-23.

None of Petitioner's arguments were addressed in the order of the Wyoming Supreme Court, although the concurring opinion expressed a concern that the procedure adopted by the majority might be constitutionally infirm.

App. at 56-57.

REASONS FOR ALLOWING THE WRIT

A. Given the Magnitude and Multitude Nationally of Projects Facing or Likely to Face Abandonment, the Question Presented Is of Wide Import.

This petition presents an issue which is part of a nationwide phenomenon. Many generating projects, particularly nuclear projects, have been terminated by public and private utilities and the majority of state regulatory commissions have been required to address the ratemaking treatment to be given the associated costs. The phenomenon is of sufficient significance that the United

States Department of Energy ("DOE") published a study in April 1983 entitled "Nuclear Plant Cancellations: Causes, Costs, and Consequences." Energy Information Administration, US Dep't of Energy, DOE/EIA-0392 (April 1983). The DOE study revealed that, by the end of 1982, 100 nuclear units had been canceled by public and private utilities. Id. at x. These canceled projects represent almost half of the nuclear capacity ordered by the electric utility industry since the inception of commercial nuclear power. Id. at ix. Further, the study estimated that future abandonments of projects vulnerable to cancellation would involve total investment ranging from $4.5 to $8.1 billion, or approximately equal the combined costs of all previous major cancellations. Id. at 65, 69.

As identified by the DOE, financial difficulties were frequently the cause or a significant part of the cause of abandonment. Id. at 17-25. The attempt by a utility already strapped for funds to absorb an additional multimillion dollar loss can be crippling. Thus, the Ohio commission allowed an emergency rate increase of $90 million for Ohio Edison Company within a month of the Ohio Supreme Court denial of amortization and as a direct recognition of the impact of that decision on the utility's financial health. Ohio Edison Co., Case No. 81-898-EL-AEM (Ohio PUC July 31, 1981). App. at 135.

Petitioner is aware of at least 125 cases decided by state regulatory bodies and the Federal Energy Regulatory Commission which have addressed the issue of the ratemaking treatment to be given costs associated with abandoned

generating projects, both nuclear and other.[5] By far the typical ratemaking treatment has been to determine the prudence of the utility and then balance the interests of consumers and investors, splitting the cost responsibility between them. See e.g., Union Elec. Co. v. FERC, 668 F2d 389, 397-98 (8th Cir 1981).

There has been, however, an increasing trend in recent years for commission staffs and intervenors to argue that some aspect of state law prohibits the granting of recovery, even in the absence of a finding of imprudence. The constitutionality of such arguments has been raised and is presently pending before state courts in Missouri, Montana, New Hampshire, Oregon and Washington.

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[5] A listing of these cases by jurisdiction was appended to Petitioner's briefs both before the Wyoming Supreme Court and before Respondent.

Missouri v. Pub. Serv. Comm'n, Case No. CV 183-1064cc (Mo Cir Ct April 16, 1984); Pacific Power & Light Co., 53 PUR4th 24 (Mont PSC 1983); Pub. Serv. Co. of New Hampshire, DR 83-398 (NH PUC March 9, 1984); Portland General Electric Co., UM 13, Order No. 83-879 (Or PUC Dec. 27, 1983); Washington Util. & Transp. Comm'n v. Puget Sound Power & Light Co., 54 PUR4th 480 (Wash UTC 1983); Washington Util. & Transp. Comm'n v. Pacific Power & Light Co., 51 PUR4th 158 (Wash UTC 1983).

Given this trend toward complete denial of compensation - the first case to result in complete denial known to Petitioner occurred as recently as 1979 (Pacific Power & Light Co., Order No. 79-754 (Or PUC Oct. 29, 1979)) - and the magnitude and multitude nationally of projects still vulnerable to cancellation, the present resolution of the issue would be timely.

B. State Courts Addressing This Issue Have Disagreed on its Resolution.

The most well-known case nationally of a state supreme court's denial of direct amortization of an investment in a later-abandoned project is Office of Consumers' Counsel v. Pub. Util. Comm'n, 67 Ohio St 2d 153, 423 NE2d 820 (1981). There, in a case involving Cleveland Electric Illuminating Company, the Ohio Supreme Court held for the first time that state law prohibited direct compensation for abandoned generating projects. The constitutional issue was not dealt with by the court until its decision in Dayton Power & Light Co. v. Pub. Util. Comm'n, 4 Ohio St 3d 91, 447 NE2d 733 (1983). There the court found no taking had occurred.

Cleveland Electric Illuminating continued to pursue its remedies in Ohio and twice appealed decisions of the state supreme court to this Court, both of which were dismissed for lack of a properly presented federal question. 455 US 914, 102 S Ct 1267, 71 L Ed 2d 455 (1982); ___ US ___, 103 S Ct 712, 74 L Ed 2d 943 (1983). By the time Cleveland Electric Illuminating appealed to this Court for the third time, the Ohio commission had increased the company's allowed rate of return to compensate the company for the increased risk its investors had to bear because of the denial of direct amortization. Cleveland Elec. Illuminating Co., 46 PUR4th 63 (Ohio PUC 1982). This time, this Court denied Cleveland Electric Illuminating's appeal for want of a substantial federal question. ___ US ___, 104 S Ct 47, 78 L Ed 2d 68 (1983).

In Petitioner's case today there has been no compensation, either directly through amortization or indirectly through an increased allowed rate of return. Similarly, the Missouri commission gave no compensation in an identical situation to Union Electric Company. 57 PUR4th 169 (Mo PSC 1983). Nevertheless, the Missouri Circuit Court found, simply citing without discussion this Court's denial in the Cleveland Electric Illuminating case for want of a substantial federal question, that complete denial was not an unconstitutional taking of private property without just compensation. Missouri v. Pub. Serv. Comm'n, Case No. CV 183-1064cc (Mo Cir Ct April 16, 1984). App. at 126. This case is presently before the Missouri Supreme Court.

The Court of Appeals for District III in Wisconsin made a similar finding in a case involving the Wisconsin Public Service Corporation, i.e., that the complete denial of recovery of costs associated with an abandoned project "does not confiscate utility property." Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n, No. 79-1929 (Wis Ct App Dec. 22, 1981). App. at 170. That decision was reversed by the Wisconsin Supreme Court, allowing the utility to recover some of its costs. Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n, 109 Wis 2d 256, 325 NW2d 867 (1982). In reversing the court of appeals, the Wisconsin Supreme Court applied an "arbitrary or capricious" review standard to the commission's initial decision denying compensation. However, the court's final conclusion was that "Since the commission's accounting treatment prevented the recovery of

$7.5 million from ratepayers, future rates would necessarily be unjust and unreasonable." Id. at 871. As noted above, the just and reasonable standard has been held to coincide with applicable constitutional standards.

In short, the state courts have varied substantially in their application of federal standards to this issue. The issue will recur in the future given the factors which have recently required the abandonment of many nuclear and other generating facilities. This is a compelling reason for granting certiorari.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to issue a writ of certiorari to and reverse the decision of the Wyoming Supreme Court. The case then should be remanded for compliance with Fed. Power Comm'n v. Hope Natural Gas Co. and West Ohio Gas

Co. v. Pub. Util. Comm'n by requiring Petitioner's prudence with respect to these projects to be reviewed and the interests of both Petitioner's consumers and investors to be weighed.

Respectfully submitted,

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